No. 151

Brief of Wilson for Appellant

Filed Jan. 13, 1900

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 151.

THE COUNTY OF APACHE,
Appellant,
vs.
JULIA BARTH, Executrix of Jacob Barth, Deceased,
Appellee.

Appeal from the Supreme Court of the Territory of Arizona.

APPELLANT'S BRIEF.

Filed this ..... day of ..... 1899.

.....
Clerk.

J. F. WILSON,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

No. 181.

THE COUNTY OF APACHE, *Appellant,*
vs.
JULIA BARTH, Executrix of Jacob Barth, Deceased, *Appellee.*

Appeal from the Supreme Court of the Territory of Arizona.

APPELLANT'S BRIEF.

This was an action brought by Jacob Barth, formerly a resident of the county of Apache, in the Territory of Arizona, but, at the time of the bringing of the suit, he was a resident of Grand Rapids, Michigan.

The action was brought on September 10th, 1891, on forty alleged county warrants, alleged to have been issued to various individuals named in the complaint in the year 1884, and all of which had been transferred or assigned to him, amounting to $7,770.75, and that he was the owner thereof.

The said cause was transferred by change of venue to Coconino County in said Territory and filed in that Court October 3d, 1891; and thereafter, by change of venue, was transferred to the Yavapai County Court; and thereafter, on May 6th, 1896, was transferred to the District Court of

Maricopa County in said Territory, where it was finally tried. (As to these filings, see page 1 in the Transcript.)

The original complaint alleged that the defendant county was indebted to the plaintiff, making a general declaration upon all of the warrants, in the sum of $7,770.75, on account of the forty warrants sued on—alleged in a general way that the said county, through its officers and agents, between the 5th day of August, 1884, and the 1st day of January, 1885, made, executed, issued and delivered the warrants declared on. (See Transcript, pages 1 and 2.)

The plaintiff then made separate declarations, upon each of the various alleged warrants sued on in the following manner:

1.

Adopted paragraphs one and two of the first count and then declared as follows:

2.

That on the 13th day of July, 1884, said defendant, acting through its legal agents, to wit., its board of supervisors, in its open and regular session, made, executed, issued and delivered to Julius Becker his warrant or writing obligatory in the following words and figures, to wit:

No. 17. APACHE COUNTY WARRANT.

$69.50. ROAD FUND.

ST. JOHNS, A. T., July 13th, 1884.

Treasurer of Apache County will pay to Julius Becker the sum of Sixty nine and 50-100 Dollars for road work.

LUTHER MARTIN,

CHARLES KINNEAR, Chairman Board of Supervisors.

Clerk Board of Supervisors.

Wherein and whereby said defendant undertook and promised to pay to said Julius Becker on demand, said sum named in said warrant, for and on account of work done on defendant's road by said Julius Becker, at said defendant's special instance and request: (Folios 4 and 5, Transcript.)

3.

That thereafter, as provided by law, said warrant was presented for payment, and the payment demanded of the county treasurer of Apache County, and by him payment thereon was refused, and by him said warrant was duly registered for payment, and endorsed as follows, to wit: "Not paid for want of funds. Presented this 12th day of July, 1884. D. Baca, County Treasurer, A. Ruiz, Deputy."

4.

That after its said issuance by said board of supervisors, said warrant was endorsed by Julius Becker and Sol Barth, and by said endorser for a valuable consideration sold and delivered and now belongs to this plaintiff, of which defendant had due notice.

5.

That after said county treasurer had published notice, as provided by law, that said treasurer was prepared to pay said warrant, plaintiff presented the same to him and demanded payment thereon, which was by him refused; and thereafter and heretofore he presented the same for payment and demanded payment thereon from said board of supervisors of said Apache County, then and there being in regular and open session, and payment thereon was refused.

Wherefore, said sum of $69.50 and interest thereon at the rate of ten per cent per annum from the said 12th day of July, 1884, is due from defendant to this plaintiff on this warrant, and judgment demanded. (See Transcript, page 3, folio 5 to 6.)

This was special declaration on the first warrant declared on in one count, and they followed separate declarations of the same sort on all of the other thirty-nine warrants sued on, as will appear by reference to the record, pages 3 to 51, inclusive.

(We state this to show the form of the express declaration as set forth in the original complaint.)

This was answered, and various steps taken, until finally the original plaintiff died, leaving his widow, Julia Barth, as successor to his interest. She thereafter came forward, and on March 30th, 1896, filed an amended complaint, declaring upon each of each of the said warrants in separate counts. We here give the declaration on the first count to show the manner and the form of the issue tendered, which is in words and figures as follows (omitting the caption and cause):

1.

That at St. Johns, the county seat of Apache County, in the Territory of Arizona, on or about July 10th, 1884, said county being justly indebted to Julius Becker in the sum of sixty-nine dollars and fifty cents, which indebtedness was at that time due and unpaid, the board of supervisors of said county, then being in regular session, did duly admit, find, allow, adjudge and determine that there was due to the said Julius Becker in the premises, from said county, the sum of sixty-nine dollars and fifty cents, to be paid on account of the said indebtedness, and thereupon, to wit; on July 13th, 1884, the said board did allow, draw and issue to the said Julius Becker, a certain warrant of said county, numbered 17, signed by Luther Martin as the then chairman of the said board, and countersigned by Charles Kinnear as the then clerk of said board, which warrant commanded the treasurer of said county to pay to the said Julius Becker or order the sum of sixty-nine dollars and fifty cents out of the road fund of said treasury, a true copy of which warrant, with all endorsements thereon, is hereto attached, marked "Exhibit No. 1," and made a part hereof.

2.

That afterwards and on July 13th, 1884, said warrant was by the holder thereof duly presented to the treasurer of said county and payment thereof demanded, and which demand and payment was by the treasurer refused; that said treasurer then and there endorsed upon said warrant the following words, to wit: "Not paid for want of funds," and annexed thereto the date of said presentation and

signed his name thereto, all of which will more fully appear by reference to said "Exhibit No. 1."

3.

That in the year 1884 and after said warrant was presented to and endorsed, as aforesaid, by said treasurer, said warrant was by the said Julius Becker, for a valuable consideration, sold, transferred and delivered to one Sol Barth, who thereupon and for a valuable consideration sold, transferred, and delivered the same to said Jacob Barth, who then and there became and ever since then to and until the date of his death hereinafter mentioned was the owner and holder of said warrant.

4.

That in and by said presentation to and endorsement, as aforesaid, by said treasurer, the said warrant became, was, and is entitled to preference as to the payment out of moneys in said treasury appropriated to and belonging to said fund according to the priority of time in which the same was presented, as aforesaid, over other warrants on said fund; that said treasurer has not at any time since said warrant was so, as aforesaid, presented and endorsed by said treasurer, set apart any money nor so much as may be necessary for the payment of said warrant or any part thereof; that there has not been at any time since then nor is there now any moneys set apart in the said treasury applicable to the payment of said warrant or any part thereof.

5.

That afterwards and on or about the fifth day of April, 1887, the defendants board of supervisors, under and by virtue of chapter 2, title XXXI, of the Revised Statutes of Arizona, 1887, duly decided to fund and redeem all its outstanding indebtedness; and thereupon said board gave due notice that the said board would fund and pay in bonds all outstanding indebtedness of said county, including said warrant; and thereupon and within the time limited within said notice, to wit, on January 9th, 1888, said

Jacob Barth caused said warrant among others, to be presented to said board for approval, redemption and funding under said notice and law; but the said warrant or any part thereof the said board and said defendant failed and refused and still fails and refuses to approve, redeem or fund.

6.

That said defendant has at all times neglected and refused and now does neglect and refuse by levy of taxes, by setting apart of funds, by redemption, by funding or otherwise, to pay or provide for the payment of said warrant or any part thereof.

7.

That at the time of the commencement of this action the said Jacob Barth was a resident of the city of Grand Rapids, county of Kent, State of Michigan; that the defendant was during all the times hereinafter mentioned, ever since continuously has been, and now is a body politic and corporate within the Territory of Arizona.

8.

That on the fifth day of January, 1892, the said Jacob Barth, at said Grand Rapids, died, leaving a will whereby he appointed the plaintiff sole executrix thereof; that on the 8th day of February, 1892, said will was duly proved and admitted to probate in the Probate Court of said county of Kent; that a copy of said will so proved and admitted to probate as aforesaid, and together with the probate thereof duly authenticated, was by the said executrix presented on the 17th day of February, 1896, to the Probate Court of the county of Yavapai in said Territory, and thereafter, to wit, on the second day of March, 1896, the said copy of the said will and the probate thereof aforesaid was duly proved and allowed by the Probate Court last aforesaid, and that thereupon, on the 30th day of March, 1896, letters testamentary were duly issued and granted by the said Probate Court of said Yavapai County to the plaintiff, who thereupon duly qualified and entered

upon her duties as such executrix; which said letters ever since have been and are now in full force and unrevoked.

9.

That on the 30th day of March, 1896, this Court duly made and entered an order reviving the action in which this amended complaint is filed and continued the same in the name of this plaintiff.

10.

That the plaintiff is the owner and holder of said warrant, and that there is now due plaintiff thereon the sum of sixty-nine dollars and fifty cents, together with interest thereon, at the rate of 10 per cent per annum, from July 13th, 1884, until paid.

(See folios 118 to 122, inclusive, at pages 74, 75 and 76, Transcript.)

That was answered with an amended answer, beginning with folio 255, page 132, Transcript, which was in the following language: (Omitting the caption.)

1.

That she excepts to sufficiency of the said amended complaint, and demurs thereto, for the following reasons, to wit:

1. Because the said amended complaint fails to state facts sufficient to constitute a cause of action.

2. Because each and every warrant and all of the same show, upon their and each of their face, that more than five years elapsed from the date of the pretended issuance of the same and each of the same and from the time that they and each of them were presented to the treasurer of said county for payment until the bringing of this action against defendant, and therefore they and each of them and all of the same are barred by the statute of limitations.

Wherefore defendant prays judgment that plaintiff take nothing by her action herein, and for cost of this action and for all general relief.

J. F. WILSON,
Attorney for Defendant.

And for a second cause of defence defendant says:

That she denies each and every, all and singular, the allegations in the said amended complaint made, and every part thereof (except the death of the said Jacob Barth, the appointment of Julia Barth as executrix, and the presentation of the said pretended warrants, which defendant admits) as fully and specifically as if each denial was herein pleaded at length.

2. Denies that the said forty warrants or any or either of them herein sued on and which are exhibited in said amended complaint, numbering from No. 1 to No. 40, inclusive, was or were ever issued or directed to be issued by the board of supervisors of the said county of Apache or by the authority of said board.

3. Denies that the said board of supervisors of said county of Apache ever ordered the issuance of said warrants herein sued on or either of them, but, on the contrary, defendant alleges the fact to be that the said pretended warrants herein sued on and each of the same and all thereof were and each of them was falsely made and forged, and that they are and each of them is a forgery, and that they were so falsely made and forged with a fraudulent intent to defraud the said county of Apache.

For a third defence herein defendant says:

That the said plaintiff herein, the alleged holder and owner of the said warrants herein sued on, and those from whom the said warrants were obtained by plaintiff, because of the fact that the said warrants and all of them were and had been by the said county of Apache alleged to be forgeries and of no binding effect upon said county, on the 9th day of January, 1888, and while the said board

of supervisors of said county of Apache was in regular session at the court house, in the town of St. Johns, in said county, presented, and caused the same to be done, the said warrants and each and every one of them herein sued on and marked exhibits from No. 1 to No. 40, inclusive, to the said board of supervisors as a claim and claims, as binding obligations against the said county of Apache, and upon the hearing thereof by the said board the same and each of the same were adjudged to be forgeries and were then and there disallowed and rejected as binding obligations upon said county of Apache and no proper charge against her.

That said plaintiff and all concerned in said warrants and each of them did not appeal from said order of rejection, nor did the said plaintiff nor the said Jacob Barth, who then and there presented the said warrants and each of them to the said board for allowance, as aforesaid, did not, within six months nor for many years after, bring action on said warrants against the said county after the final action of the said board aforesaid, as is provided in paragraphs 415, section 35, Revised Statutes of Arizona, and hence defendant here says that the said plaintiff herein should not be permitted to maintain this suit because of the same being barred by the statute of non-claim in such cases.

Wherefore defendant prays judgment, etc., as in first paragraph of this answer.

For a fourth and special defence herein defendant says:

She denies that the said county of Apache was on the 10th day of July, 1884, or at any other time or at all, indebted to Julius Becker for the sum of sixty-nine dollars and fifty cents or any other sum.

2. Denies that on the 13th day of July, 1884, or at any other time or at all, the said county of Apache, by and through the board of supervisors, did allow said claim for the said amount above made and denies that the said board of supervisors on said day did cause that certain

warrant, of said county, No. 17, to be issued, and denied that it was ever issued by authority of said county or of said board of supervisors.

And in connection herewith defendant avers that the said pretended warrant No. 17, and made Exhibit No. 1, was not and is not genuine, but was and is a forged instrument, and was forged for the purpose of defrauding the said county of Apache.

Defendant further avers that said pretended warrant upon its face shows that more than five years have elapsed from the time the same purports to have been issued and presented to the county treasurer of said county for payment until the bringing of this action; hence defendant says *actio non*.

Wherefore defendant prays judgment, etc., as in first paragraph herein.

(See folios 215 to 218, inclusive, at pages 132, 133 and 134, Transcript.)

This was the answer made generally and specially, joining issue of both law and fact, to the first count. Plaintiff's separate declarations on the other thirty-nine alleged warrants were answered in precisely the same way, with the same character of answer, making the same issues in each count from first to last.

They all being the same, we set out only the issues joined on the first count, and on this present the case, because it was on this that the case was finally tried on May 6th, 1896, in the District Court of Maricopa County, Territory of Arizona.

This gives the true state of the pleadings in the case as they began and as they existed at the time the case went to trial and was tried, and out of these the questions of law and fact arose; and it was upon the hearing on these issues that judgment was rendered against the defendant county in the sum of $14,352.13, and appellant appealed.

It will be seen, therefore, from the declarations and answer, that the issues were:

First. A question of law raised by special demurrer, raising the question of limitation, interposed because the warrants showed on their face that more than five years had elapsed from the date of their pretended issue, etc., to the time of bringing the action.

Second. Was the general denial of the facts stated in the amended complaint, and

Third. A denial that the alleged warrants numbering from one to forty, inclusive, were ever issued or directed to be issued by the board of supervisors of that county or by its authority; denied that the board of supervisors of Apache county ever ordered the issuance of the warrants or either of them. In other words, it was a general plea of *non isfactum*, concluding with the declaration that the said pretended warrants and each of them had been falsely made and forged, and that each was a forgery, and was falsely made and forged with the fraudulent intent to defraud the county of Apache.

The next issue relied upon was a denial of fact, that the said county on the 10th day of July, 1884, or at any other time, was indebted to Julius Becker in any sum; and denied that Becker ever filed any such account with the board; denied the allowance of any such a claim or account, and the issuance of a warrant thereon; and the concluding answer was a special plea of limitation.

This answer was at the trial duly verified, by permission of the Court, as follows:

TERRITORY OF ARIZONA, } ss.
County of Yavapai, }

N. Gonzales, being duly sworn, says: That he is the clerk of the board of supervisors of the county of Apache, in the Territory of Arizona, and the custodian of the records of the said Board. That he has heard read the above and foregoing answer of the county of Apache, defendant in the above and foregoing action, and that the facts therein stated as defences to the various causes of action declared on, are true: and the warrants sued on are not genuine.

N. Gonzales.

Subscribed and sworn to before me this, the 6th day of May, 1896.

[SEAL] J. E. WALKER, Clerk.

(Folio 251, Transcript.)

This was the state of the issues at the time of trial, and from which appears that the plaintiff had declared:

First. The filing of an account before the board of supervisors.

Second. The consideration of that account by the board.

Third. The auditing of the same.

Fourth. The order for the warrant thereon.

Fifth. The issuance of warrant by its order.

All of which were generally and specially denied and the answer denying them sworn to.

Upon these issues the cause was tried and submitted to the Court for determination, the plaintiff introducing the disputed warrants and no other evidence whatever, (see pages 169, 170, Transcript,) which was by the Court taken under advisement until the 20th day of March, 1897, when on that day the Court rendered judgment in favor of plaintiff and against defendant for the amount heretofore named, upon the following findings:

First. The Court found that the plaintiff, in open court, admitted that the figures on the following described warrants, indicating the amount thereof as well as the writing on the face of the warrants, giving the amount thereof, had been altered and changed, and therein set forth the warrants, eleven in number.

Second. That all of the warrants sued on in the said amended complaint, except those admitted to be invalid and forged, were valid, subsisting, and legal claims against the said county, and that plaintiff, according to the prayer of her complaint, was entitled to recover from defendant the face value of each of the warrants, with ten per cent interest thereon until paid from the date of their presentation to the county treasurer and payment refused.

The Court further found that each of the said warrants was presented to the treasurer, and payment thereon for lack of funds was refused.

(See folios 257 and 258, pages 154 and 155, Transcript.)

These were the only expressed findings named in the judgment. There was no expressed finding on any of the other issues joined by the pleadings, but judgment rendered specially for each of the warrants and for all of them, naming them separately, as will appear by reference to the judgment set out from folios 256 to 264 on pages 154-158 of the Transcript, all inclusive.

Thereupon, on the 22d day of March, 1897, the defendant county filed her motion for a new trial, on the following grounds:

1. Because the Court erred in finding against the defendant's plea of the statute of limitations herein pleaded, and in not sustaining the same, and in rendering judgment against defendant over the said plea of statute of limitations pleaded in the defendant's answer against the plaintiff's various causes of action.

2. Because the Court erred in not sustaining defendant's plea of limitation, set up against plaintiff's various causes of action, set up in her said complaint in each of the same.

3. Because the Court erred in finding that the said warrants sued on in plaintiff's complaint and each of the same on which judgment in this action was rendered, was legally issued.

4. Because the Court erred in finding against the plea of defendant "that the warrants and each of them was forged and not of any binding effect against defendant."

5. Because the findings of the Court and the judgment in this action rendered, are contrary to the evidence in the cause, is against the evidence as shown by the record, and the face of the warrants sued on, and is contrary to the law of the cause; and

6. Because the Court erred in over-ruling defendant's motion for a new trial.

(See folios 272-273, page 127, Transcript.)

This motion for a new trial as thus made was general assignments for the consideration of all legal questions arising under the issues as joined by authority of Section 5 of Act No. 71, at page 128, passed by the Legislative Assembly of the Territory, March 18th, 1897, which provides as follows: All rulings made by the Court below in opposition to the plaintiff in error or appellant shall be taken as excepted to by the party appealing or suing out the writ of error, and when assigned as error in the brief, shall be reviewed in the Supreme Court without any bill of exceptions or other assignments of error, except as herein provided.

These errors heretofore named, were assigned in the brief, which was proceeded by the assignment of errors filed in the District Court, and for the consideration of the Supreme Court, on October 26th, 1897, which were as follows:

ASSIGNMENT OF ERRORS.

First. Because the Court erred in over-ruling defendant's special demurrer interposed in the action against plaintiff's complaint, for the reasons:

1. Because each and every count in said complaint showed on its face, and so did the exhibit on which the declaration and each of the same and every one of them, was based, that the said cause and each of the said causes and each of the said warrants declared on was and were barred by the statute of limitation long before the bringing of said action.

2. Because the said complaint, in each and every cause therein stated, and the warrant and each of them declared on, all show on their face, and each of them did, that the same and all thereof was and were barred by the statute of limitations, long before the bringing of said action; that the said complaint filed in each and every of the said counts

therein made and set up, showed no reason why the statute of limitations should be avoided.

Second. Because the Court erred in not sustaining defendant's special plea of limitation, set up against plaintiff's several causes of action in her complaint made, for the following reasons:

1. Because the several causes of action and the several warrants on which they and each of them were based, showed on their face that they were barred by the statute of limitations long before bringing this suit

2. Because plaintiff states no reason for the avoidance of the statute bar.

3. Because the brief and the record showed that the defendant directed the resistance of payment of the said warrants in the year 1885, and more than five years before the bringing of this action, and hence, the absolute bar of the same by the statute of limitations.

Third. Because the Court erred in finding that each of the said warrants, for which judgment was rendered, were legally issued, for the reasons:

1. That they and each of them showed on their face that they were not, but were forgeries.

2. Because the defendant's answer was made and was verified by the oath of the clerk of the board of supervisors of the county of Apache, and stated under oath that the said warrants for which judgment was rendered, and each of the same, was and were forged, that they were not genuine, and were not issued by authority of the said county of Apache; and therefore and thereby imposed on plaintiff the burden of proving that said warrants and each of the same were genuine, and were issued by the authority of the said county, before plaintiff was entitled to judgment thereon, all of which plaintiff failed to do, and on which, and over the objections of defendant, and over the said verity of the said answer and without proof, the Court rendered said judgment,—hence, grave error and violation of the statute.

Fourth. Because the said judgment is contrary to the pleadings and the evidence in the case, and is not borne out by the same.

Fifth. Because the said judgment is contrary to the law of the case and is not borne out by the same.

(See folios 352, 353 and 354, found at pages 220 and 221, Transcript.)

Upon this record and upon these assignments of error thus made, on January 26th, 1898, this case was heard by the Supreme Court—was argued orally and on brief in its presence on appeal, and by it taken under advisement (see folio 356, Transcript), and, on April 16th, 1898, the Supreme Court, in session, rendered the following judgment:

"This cause having been heretofore submitted, and by the Court taken under consideration, and the Court having considered the same and being fully advised in the premises, it is ordered that the judgment of the District Court herein be, and the same is, hereby affirmed." (Folio 357, Transcript.)

And therewith the opinion was handed down, which is found beginning with folio 358, at page 223, and concluding with folio 373, at page 231, all inclusive, in the Transcript.

In that opinion, among many other things that was said, the Court there declared against the plea of limitation in all of its forms, following the Alabama and Nebraska rule provided for in those States by statutes, which is not so here; and, also, as to the fact of the verified answer, the Court said: "That the weight of authority is decidedly that the extent and effect of a verification is to enable defendant to disprove by affirmative evidence the execution of the warrants, or the regularity, or the legality of the proceedings on which their issue was based, and that the *prima facie* case already made by the presentation of the warrants, duly executed and in proper form, stand until it is destroyed."

Apprehending that the Court had overlooked the force of the assignment of errors made for its consideration,

and the legal propositions brought out by them, on April 30th, 1898, the defendant county filed its motion in that Court for re-hearing, and set up the following reasons:

First. Because it seems apparent from the decision handed down by the Court, that the Court in passing on the points raised by the exceptions and statement of errors of fact and law pointed out in the said exceptions and brief, overlooked the force of the law brought out by the verification of defendant's answer, that is:

1. That the effect of the statute and the intent of it would be to require the plaintiff, relying on any instrument in writing, the genuineness of which is denied under oath, to establish the genuineness of such instrument before the same could be admitted in evidence for any purpose whatever. In other words, that the intent and effect of such verification was to throw the burden of proof on plaintiff, both as to the instrument and cause, as was the case at common law.

2. It seems apparent that the Court overlooked the fact in the record that the declaration on the warrants sued on was based on an alleged filing of an account of demands of various individuals, as the authority for the issuance of the various warrants sued on, and before the issuance of the said warrants, and which declaration was denied under oath, and not met with any evidence whatever; and hence the rule, that the denial of the facts stated in the declaration or complaint, being denied under oath, cast the burden of proving every allegation made in the complaint on the plaintiff, was also overlooked.

3. Because the holding in the opinion handed down by the Court in this case, that the verification of the answer by appellant, does not cast the burden of proof on plaintiff, but only gives to defendant such standing in Court as to authorize her to prove her defense, is a reversal and overthrow of the rule in such instances, seems to be apparent error, and which seems to have been overlooked by the Court in its deliberations in this case.

Second. Because in the opinion handed down by the Court on the point of limitation, the Court overlooked

the fact proven, that the proof of the case showed that the warrants in 1883 and 1885 had been paid before issue in this case in 1888 arose; and hence, these warrants, if genuine, were barred as a matter of fact.

(See folios 374–376, inclusive, pages 232 and 233, Transcript.)

This motion was by the Court taken under advisement until June 11th, 1898, and on that day was denied. (See folio 376, Transcript.)

And on the same day, to wit: June 11th, 1898, the Supreme Court of Arizona, through its Chief Justice, signed and filed the following statement of facts in said cause, (we omit the caption of the cause) which are as follows:

"Statement of facts of the Supreme Court of the Territory of Arizona, sitting as a Court of Appeal from the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Maricopa, where the case was tried by a jury and judgment rendered against the ap pellant for $14,352.13, appellant appealed."

1. The Supreme Court takes the facts as found by the District Court on the trial in that Court and as shown by the record, and makes them a statement of facts in this case.

2. This Court finds that the District Court did not commit error in finding against the plea of limitation set up by appellant.

3. The Court further finds that the District Court did not commit error in granting and rendering judgment in favor of appellee on the warrants sued on and against appellant, notwithstanding the verified answer of appellant.

4. The Supreme Court further finds that the District Court did not commit error in refusing to render judgment for appellant on the verified answer of appellant, notwithstanding appellee did not introduce any evidence to establish the genuineness of said warrants, for which appellee asked judgment, because—

5. The Court finds that the warrants were a verity of themselves, and the verified answer only put appellant in position in Court to prove the facts set up in her answer, and did not put appellee on proof of their genuineness; hence, the Supreme Court finds, as a conclusion, that the judgment of the District Court should be affirmed. Judgment of affirmation and confirmation was therefore ordered and directed this June 11th, 1898.

WEBSTER STREET,
Chief Justice Supreme Court of the Territory of Arizona.

(See page 235, folio 380, Transcript.)

Now, this is a complete statement of the record; that is, a complete statement of the important features and points of the record from the bringing of the action until the final findings of fact by the Supreme Court of the Territory of Arizona, from which judgment we appeal to this Court.

This statement is made in the order of time in which the various acts, steps, proceedings and adjudications were had, omitting all dilatory and superfluous matter.

So that now, on this appeal, it being an appeal from the judgment of the Supreme Court of the Territory of Arizona, we assign the following errors as having been committed by said Supreme Court in its judgment sustaining the judgment of the Court below.

FIRST.

The Court erred in sustaining the judgment of the Court below in overruling appellant's (defendant below) demurrer, because—

Every count in the complaint, and every warrant sued on showed on its face that more than five years had elapsed from the date of the alleged issuance of said warrants and presentation to the county treasurer, to the date of the action, and show no reason for the avoidance of the statute; hence the judgment is erroneous under rules of General law.

SECOND.

The judgment of the Supreme Court of the Territory is erroneous for not sustaining defendant's special plea of limitation under the pleadings and proof in the case, because—

1. Plaintiff alleged in the original complaint that the treasurer of defendant county, after notice of funds being on hand, refused to pay the warrants on demand; and, that in the said amended complaint, alleged that defendant county, AT ALL TIMES, had resisted payment of these warrants, "by refusing to levy taxes," "refusing to set apart funds," "by funding," or otherwise providing for payment.

2. Because the proof—uncontradicted proof—in the case showed that said county had resisted payment of said warrants by order on public records of said county, and standing public notice in county treasurer's office from March 19th, 1885, thereby corroborating the said plea, that payment was AT ALL TIMES resisted, etc., all of which showed the lapse of more than five years from date of resistance to date of bringing suit.

THIRD.

The judgment of the said Supreme Court is erroneous for sustaining the judgment of the Court below, and in not rendering judment for defendant county on the pleadings and proof, because:

1. The answer was verified by the oath of the proper officer, as provided by law, denying the account on which the warrants rested.

2. Denying that such was either considered, or audited or allowed.

3. Denying the order for the warrant sued on.

4 Denying the issuance of any such warrant by defendant county, or by its authority.

5. Denying the genuineness of the same, and

6. Declared each and all forgeries,—thereby requiring the genuineness of said warrants to be established before

they could become evidence upon which any judgment could be legally founded on them, and on which plaintiff furnished no evidence whatever.

FOURTH.

The Supreme Court committed grave error in finding and adjudging, in the face of a verified answer—

1. That the said warrants were verity of themselves.

2. That the verified answer only put appellant in position in Court to prove the facts set up in her answer, and did not put appellee on proof of their genuineness.

FIFTH.

The Supreme Court erred in not sustaining, and directing the Court below to sustain defendant's allegation of forgery on her sworn plea, and on the evidence in the cause sustaining it.

This brings us to a review of the authorities to sustain these errors, first of which is the Statute of the Territory, which provides: Revised Statutes, paragraph 2314, section 18, re-enacted in an amendatory statute, passed by the Legislative Assembly of 1891, page 74, (53 of new publication,) section 1, as follows: "Actions for debt, where the debt is evidenced by or founded upon any contract in writing executed within this Territory, shall be commenced and prosecuted within five years after cause of action shall have accrued, and not afterwards."

This language is plain. The action shall be commenced after the cause accrues within five years. It can't be afterwards.

The question then is, when does the action accrue? The statute is silent upon that point. It doesn't say. Then we are left to general law, and to decisions bearing upon it, as to the time when such an action does accrue.

It is elementary that the statutes of limitation such as those, statutes of repose, begin to run against the written obligation to pay, from the time that the right of payment accrues to the payee—never later than the time when the payee has the right to demand payment of the obligation held.

Now, we say this is elementary, and unless changed by some statutory provision, which we do not have, the statute certainly begins to run from that date.

To sustain this fact, we submit the following authorities:

Emery vs. Day, 1 Compton, M. & R. ex 245.

Perry vs. Parish of Vermillion, 21 Louisiana, 645.

Palmer vs. Palmer, 36 Michigan, 470.

Crawford County vs. Wilson, 7 Arkansas, 214.

Crudup vs. Ramsay, 15 South West, 458.

King vs. Frankford, 43 Pacific (Kansas), 983.

Carpenter vs. Township of Union, 12 North West (Iowa), 290, and cases there cited.

Goldman vs. Conway County, 10 Federal, 888.

Cross vs. Bank of Commerce of Grant County (N. M.), 54 Pacific, 880.

Thompson vs. Searcy County, 57 Federal, 1036.

Wilson vs. Knox County (Missouri), 28 South West, 896, and cases there cited.

COMMENT.

These cases, most of which are for actions on county warrants, in which Limitation has been pleaded, and by the authority of statute providing for a limitation of actions, within a certain period named, within which action shall be brought and not afterwards, and in all of which they have held universally that the cause of action accrued from the date of the issuance of the warrant—and always never later than from the time when the warrants were presented to the county treasurer, and by him endorsed, "not paid for want of funds," as was the case at bar, unless some other time for the accruing of the action should be fixed by statute—and which is not the case at bar.

In the case of

Aime vs. Dubuque, 98 U. S., 470,

it being an action on a coupon for interest on a bond, from which the coupon had never been severed, and against which limitation was pleaded, this Court held, as general law and following the ruling of the State of Iowa, of course, that, notwithstanding the said coupon had not been severed from the bond, the fact that it became due and payable at a certain period, in other words, that it matured then, and that payment of which the holder had a right to demand at date of its maturity, the statute begins to run from that date as a matter of general law.

In this same decision the same principle was applied to county warrants, fixing the time when the statute begins to run at the date of issuance and presentation for payment. In other words, that they matured never later than demand and refusal to pay.

In King Iron Bridge & Manuf'g Co. vs. County of Otoe, 27 Federal, 800, decided by Judge Dunby, in which opinion Judge Brewer concurred, the general law on such statutes pertaining to county warrants, and following the fixed time by general law, when the statute begins to run against them, declared the rule to be that, "when presented to the county treasurer for payment and payment refused, the right to sue becomes complete and absolute."

We apprehend that there can be no disputing the fact that this is the rule, that is, the general rule, fixed by general law, followed by this Court and by nearly all the State Courts, the rule that has been followed ever since the passage of the act of limitation in 1623, in the 21st year of the reign of James I., fixing the time for limitation of actions and starting the statute at the date that the cause accrued, and not after.

True, in this last case cited, in the 124 U. S., 514, the Supreme Court of the United States, by force of the 34th section of the judiciary act, etc., finding that the case had been settled on demurrer in the Court below, and that the Supreme Court of the State of Nebraska, by construction of some other feature of its statute, connecting with the statute of limitation proper, had held that cause of action accrues from the time that sufficient time elapses after the

issuance of the warrant for the county to raise the means to pay it, and not from its issuance or presentation to the treasurer, the decision of the State Court being a rule of decision in the construction of its own statute, and the Court feeling bound by it in that State, wherein its own statute was involved, reversed this decision, holding that it couldn't say, under that rule, that on demurrer, sufficient time had elapsed.

This, however, was but the enunciation of the Nebraska doctrine, and following the rule of decision of the construction of the Nebraska statute by its own Court, and nothing else. It was not a decision as to the rule of general law, fixed by the decision of nearly all the Courts and this Court as well, and, therefore, not a decision binding on the Federal Courts or Courts of the Territory. In other words, it is general law, as fixed by this Court and by nearly all the other Courts, that the statute begins to run, because the cause of action accrued from the time at latest when the warrant is presented and payment refused, is the general rule by which the Courts of this Territory are bound, because we have no statute fixing any other time.

It cannot be contended that because this Court follows the rule of construction of a State statute by the State Court, that it will do the same thing in a Territory. Territorial Courts are inferior Courts to this Court, and are as much answerable for misconstruction of its own statute as for the comission of any other error, as much so as any inferior Court is to any other appellate tribunal.

But, in so far as the Nebraska case is concerned, the Supreme Court of Nebraska itself has virtually overruled it.

In the case of

Arapahoe Village vs. Albee, 24 Nebraska, 242,

the Court refers to Brewer vs. Otoe County, and after arguing around it in principal, squarely overrules it and fixes the rule to be: In so far as the statute of limitations is concerned, it applies to municipal corporations just the same as individuals, the Courts say: "The law favors

diligence, and compels a party holding a warrant of a municipal corporation to take the necessary steps to enforce the payment of the same within the period fixed by statute, or be barred."

"If this were not so, warrants might be fraudulently issued by the authorities of a municipal corporation, and held for ten, fifteen, or twenty years, or more, and then presented for payment when the evidence of their fraudulent character had become obscure or inaccessible." "In our view, the ends of justice will be better subserved by placing individuals and municipal corporations on the same plane and governed by the same law of limitations." "It follows that all the causes of action were barred when the action was brought."

From this decision it will be seen that this was an action upon the warrants of a school district, which had been duly issued, as had the county warrants in the Otoe County case; had been presented to the treasurer, and there endorsed "not paid for want of funds," and for that reason payment was refused, just as was the case in the Otoe County case; and soon after the statute bar, action was brought, as was done in the Otoe County case, and the Court there held that the case was barred, as was not done in the Otoe County case; and, in this 24th Nebraska case, the Court making emphatic declarations of law, as it did, the language of which has just heretofore been repeated, must certainly effect a complete overthrow of the principles set forth in the Otoe County case, followed by this Court in the 124th U. S., heretofore mentioned, and therefore can't possibly stand in the way of the appeal here.

This same case is found in the 8th American State Reports, at page 202, and note at page 206, referring to a great many authorities sustaining this last view expressed, following the rule laid down by Wood on Limitations, section 53, where he states:

"The statute runs for or against towns and cities, and also for or against counties, in the same manner as it does for and against individuals." See also 2, Dillon on Municipal Corporations, section 668.

We refer to that note at page 206 in this last decision, and the authorities there cited.

This much has been said and these authorities have been presented to sustain our contention in our first assignment; that is, that plaintiff's causes of action were barred by limitation, as shown upon their face, and the demurrer therefor should have been sustained. But we are not left to this alone on limitation even.

Our second assignment is: That our plea of limitation should have been sustained on the facts and admissions in the cause.

We apprehend that it will not be disputed—indeed it never has—that limitation always and under all circumstances begins to run from the time the demand is disputed, from the date that its merit is denied, and refusal to pay is based upon the disputed merit of the demand presented. This is the rule everywhere. Therefore, if not under the pleading, under the proof and admissions the plea should have been sustained and the cause dismissed. Let us see:

First. The sixth clause in every count, applying to every warrant sued on, declared affirmatively that the county had at all times refused to pay the demand. That the defendant county had refused to levy taxes, to set apart funds, to redeem, to fund, or to in any other way provide for the payment of the demand. This is a general declaration of resentment of payment confined to no particular cause. Then the rule that the construction shall be taken most strongly against the pleader. We apprehend that it can't be disputed that, from this plea, the declaration of the county's refusal to pay or provide payment must be taken to fairly mean that the resentment includes the dispute of the merit of demand, and therefore starts the statute from that date.

Second. The proof on this plea shows that the board of supervisors of the defendant county, on the 19th day of March, 1885, then being in session, because of the forgery of warrants of 1884, by a general order upon its record, ordered the prosecution of the forgers, one of the

identical men charged being the clerk of the board, Charles Kinnear, whose name appears to every warrant sued on, and also directed that these warrants be not paid and that the District Attorney notify the treasurer not to pay any of them. (See folios 290, 291 and 292, in Transcript.)

Third. At the trial it is also shown by Potter that from that date there was a standing notice in the treasurer's office not to pay these warrants. (Folio 300, Transcript.)

Fourth. The records of Apache County show that all of the warrants sued on were shown to be disputed by the record. (Page 179, Transcript.)

Fifth. At the trial the plaintiff admitted that the order of resentment, ordering the treasurer not to pay warrants of 1884, because of forgery, which order was made the 19th of March, 1885, had reference to the particular warrants here sued on. (Transcript, folios 305 and 306, inclusive, found at page 182.)

This is an emphatic admission that all of the warrants sued on here, on March 19th, 1885, were resented and payment refused, because they were forged instruments. Most certainly, then, this started the statute, if nothing else ever did. The authorities already cited are clear upon this point, and, indeed, the rule is so elementary that to cite authority would be idle.

Then, the statute beginning to run on that date, March 19th, 1885, certainly barred this action nearly two years before it was brought.

One other thing in this connection:

It will be noticed that after the statute was pleaded there was no replication made to the plea of limitation, nor was there any statement made in the complaint, nor in any count of it, that would take plaintiff's case out of the statute, nor did she attempt to do it. Therefore, her effort at avoidance of the statute must necessarily fail, because the general rule is:

"If the plaintiff would bring herself within any of the exceptions mentioned in the statute, if it has any, she

must specially reply accordingly where the statute is pleaded, and if she omit so to do, she cannot avail herself of it on trial even." See Wait's Actions and Defences, Vol. 7, 309, citing:

Witherup vs. Hill, 9 Serg. and R. (Penn.) 11.

Piggott vs. Rush, 4 A. D. and E. L. 912.

Angell on Limitation, Section 292.

VERIFICATION.

This brings us to the consideration of our third and fourth assignments of errors, or reasons given as to why the Supreme Court of Arizona committed error in confirming the judgment of the Court below, and in not directing judgment on the pleadings and state of the record, as demanded by defendant county in the Court below.

From the statement of this case as already made, and the record, it will be seen that the plaintiff, Barth, introduced the warrant declared on as evidence for the judgment obtained, and nothing else whatever. The answer was verified and placed the genuineness of every single warrant declared on in issue. In other words, a plea of *non est factum* was made, and, under the Arizona statute requiring answer denying the execution of such instruments, or the execution of them by its authority, to be under oath, by permission of the Court, at the trial, that was complied with, and plaintiff Barth informed that the evidence of their genuineness, or any other evidence pertaining to the cause, they might introduce, which they refused to do.

Evidence was introduced, however, by the defendant county, and judgment asked, which was refused. The answer being verified denying the execution of the warrants or their issuance by the authority of the county; denying that any account upon which the warrants were based ever existed; denying the consideration of such account by the Board of Supervisors, or that the same was ever admitted or allowed, most certainly placed the burden of proof upon the plaintiff, relying upon the warrants

to establish their genuineness before they could be received for any purpose.

Therefore, the Court erred in its findings and in rendering judgment thereon.

The Court also erred in finding that the warrants were verity of themselves.

It also erred in finding that the verified answer only put appellant in position in Court to prove the facts set up up in her answer, and did not put appellee on proof of their genuineness.

This, we say, is positive error and contrary to all of the authority on the point, and as evidence of it, to the authorities we go.

The first authority is the statute, which is paragraph 735, Revised Statutes of Arizona, making the following provision:

"Any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit: * * * * *

8. "A denial of the execution by himself or by his authority, of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed."

By authority of this statute this answer was verified, putting in issue the genuineness of these warrants for which they demanded judgment.

Under that statute, that the defense was entitled to judgment unless the genuineness of the warrants should be established before they were introduced or received as evidence, see the following authorities:

Encyclopedia of Pleading and Practice, Vol. 14, page 590, laying down the following rule:

First. "At common law the denial of the execution of the instrument by plaintiff by any appropriate plea, usually the general issue, need not be under oath in order

to cast upon the plaintiff the burden of proving the execution of the instrument." And there a vast number of authorities are cited, showing that the plea itself casts the burden on the plaintiff to establish the issue tendered.

Second. "In the United States statutes have been quite generally enacted (and ours is one of them) varying somewhat in their provisions in the different States, curtailing the right of the defendant to thus impose upon the plaintiff the necessity of proving the execution of the instrument, and requiring a sworn plea or answer to be put in by the defendant." To that is subjoined a note giving the decisions of the various States, and they are numerous, discussing this rule in its various phases, and in which they are all agreed that these statutes prescribed a rule of evidence, but nowhere change the general rule, that when issue is joined the onus remains with the plaintiff, requiring him to establish by proof the allegation he makes and the genuineness of the instrument that he declares on.

These statutes were enacted for the beneficent purpose of preventing false issues.

We refer to a few cases on this point:

Horn vs. Water Co., 13 California, 62.

Corcoran vs. Doll, et al, 32 California, 83.

Waldrip vs. Black, 34 California, 409.

Assig vs. Pearson, 9 Colorado, 587, 13 Pacific, 719.

Parkinson vs. Bodaker, 10 Colorado, 503, 15 Pacific, 806.

Lathrop vs. Roberts, 16 Colorado, 604, 27 Pacific, 698.

Sheppard vs. Royce, 71 Illinois Appeals, 321.

Pate vs. National Bank, 63 Indiana, 254.

Wimberly vs. Dallas, 52 Alabama, 196.

Walker vs. Bentley, 64 Alabama, 92.

All of these cases were brought on written instruments. Many were denied by answer not verified, and in all such cases the Court held that the instruments were evidence of their execution for no other reason than that the execution was not denied under oath as required by statute.

The question arose in some of them, however, wherein the genuineness of the instrument sued on was raised by the verified answer, and in every instance where such was the case, the Court held that it was error to admit the instrument until its genuineness was established. For instance:

Lathrop vs. Roberts. 16 Colorado, 604,

was an action on a promissory note. The execution of it was denied and the answer verified.

There the Court held that "where the execution of a promissory note is denied by the answer under oath, it was error to admit the note until proof of its execution was given."

In the case of

Assig vs. Pearson, 9 Colorado, 587,

the plaintiff, Pearson, recovered judgment before a Justice of the Peace on two checks, for $50 each, purporting to have been signed by Assig. On appeal, Assig asked leave to file his affidavit in the case, denying the execution of the checks, (which he had not done in the Court below) and alleging they were forgeries, just as was the state of this case at the trial, and the Court refused to receive or consider it on the ground that it was not filed at the trial. That wasn't the case here; the Court did receive it and it was filed at the trial in this case.

In that case it was held that the affidavit denying the signature should have been received as raising the issue, and not only that, but "AS PUTTING THE PLAINTIFF TO PROOF OF THE SIGNATURE OF THE DEFENDANT." The judgment was therefore reversed.

This is a much stronger case for the position that we contend than that one was or could be.

In the case of

Sheppard vs. Royce, 71 Illinois Appeals, 321,

it was a case where the plaintiff insisted that the defendant's plea of *non est factum* and the forgery of the instrument declared on, having contained the charge of the crime of forgery, made it necessary for the defendant to prove that the signature was forged; but the Court held that the only effect of the plea was to cast upon the plaintiff the burden of proving the execution of the instrument, and that he had to do by a preponderance of the evidence.

This case applies to the case at bar squarely, and a number of others referred to therein do the same thing.

The case of

Pate vs. Aurora National Bank, 63 Indiana, 254,

was a case where the instrument sued on was denied under oath, and it was there held that the plaintiff had to prove its genuineness by a preponderance of the evidence, and so it is held everywhere.

It is also held that the rule applies where set-off is pleaded in the answer, and the set-off is based on such contracts in writing as come within the statute; that the replication must deny it under oath in order to impose upon the defendant the burden of proving the execution of the instrument.

Walker vs. Bentley, 64 Alabama, 92.

Simmons vs. Simmons, 33 Gratt, 451.

Indeed this is text law in this country. See Encyclopedia of Pleading and Practice, Vol. 14, page 596.

True, the learned Judge, speaking for the Supreme Court of Arizona in this case, in the opinion, states:

"The weight of authority is decidedly that the effect and extent of the verification is to enable defendant to *disprove by affirmative evidence* the execution of the warrants, or the regularity or legality of the proceedings on which their issue was based, etc."

We have looked in vain through all the libraries to which we have access, and they are many, without finding

a single case deciding any such principle, or finding that such is the law.

Hence, the finding and the judgment based upon it, that "the verified answer only put appellant in position in Court to prove the fact set up in her answer, and did not put appellee on proof of their genuineness," is most certainly the gravest of error.

In

Mobile, etc., R. R. Co. vs. Gilmer (Alabama), 5 Southern Rep., 139,

it being an action for damages for breach of covenant on written contract that had been duly denied, but without verity, the Supreme Court of Alabama said, among other things, referring to the issue:

"Under this state of the pleadings the Circuit Court properly ruled that in the absence of a sworn plea of *non est factum*, putting in issue the execution of the paper, it was admissible in evidence without proof of its execution."

Of course, the converse is true. If the plea of *non est factum* had been sworn to, the paper would not have been admissible as evidence without preliminary proof of its genuineness.

In this connection another principle is stated:

"The statutes, being general in their terms, apply to all negotiable instruments, without regard to the place where, or the persons by whom, they purport to have been executed."

Encyclopedia of Pleading and Practice, Vol. 14, page 595.

In

Clark vs. Polk County, 19 Iowa, 248,

it is held that the statute applies to instruments executed by municipal corporations.

In

Clark vs. Des Moines, 19 Iowa, 199,

the Court held that this statute applied to city warrants in the nature of notes.

Indeed, it is universally held that county warrants are within the requirements of the statute, which, we presume, will not be denied in this case.

ON THE PROOF.

The plea of forgery should have been sustained for the following reasons:

First. On March 19th, 1885, the record shows that the defendant county resisted the payment of the warrants on grounds of forgery.

Second. The record shows that Sol Barth, one of the principal handlers of the warrants declared on, and Charles Kinnear, the clerk of the board of supervisors, who attested and signed them all, were indicted for the alleged forgery in 1886, and additional counsel employed to aid in the prosecution.

Third. That the alleged warrants sued on, declared to have been issued in 1884, when Charles Kinnear was clerk of the board of supervisors and custodian of the records bearing evidence, and the only records which could, of the issuance of all legal warrants of the county for that year, were signed by this same Kinnear, who was indicted for their forgery.

Fourth. The proof plainly showed, and profert of the record exhibited the undeniable evidence, that all of the record which should have contained the proceedings of the board of supervisors and all of its actions with reference to these warrants, alleged to have been issued, if they ever were issued, and now sued on, had been cut away and destroyed and not a line of it left to show official action, or the want of it, of the board of supervisors for the year 1884, covering the time of the alleged issuance of these warrants, and also of the time of their alleged forgery, for which the said clerk, Charles Kinnear, and Sol Barth were indicted.

Fifth. That this mutilation, obliteration and destruction of the record was effected during the time they were

in the custody and should have been under the key of Charles Kinnear, and during the time the record was so destroyed, and he was indicted for participating in the forgery.

Sixth. At the trial, plaintiff confessed that more than 25 per cent of these warrants in number, amounting to about $1,500.00, were forgeries, and for which they could not afford to ask judgment, and they, too, were signed and attested by Charles Kinnear, and thus they admitted that there was existing forgery in the issuance of warrants sued on, and that there was criminal indictments against at least one of the parties who signed them, to wit: Charles Kinnear.

It showed also the strong probability of their all having been forged, because they were contained in the record of 1884, if properly issued, and not contained if improperly; and the whole record was in his charge, and the whole record thus in his charge was destroyed. What for? There can be but one reasonable answer, and that is: To destroy evidence of guilt and prevent his landing in the penitentiary where he belonged.

If there was no forgery except the eleven confessed, why does the record which should have contained the whole forty be destroyed to destroy evidence of the guilt as to the eleven only?

We submit, therefore, that on the merit, this case should have failed of ever having reached judgment against the defendant county.

Upon the record of the errors assigned, and the numerous authorities on every point sustaining each assignment, we implicitly rely for judgment reversing the case and remanding it back to the Supreme Court of the Territory of Arizona, with directions that it order the dismissal of the complaint and the rendition of judgment for the defendant county.

All of which is respectfully submitted.

C. F. Wilson

Attorneys for Appellant.

As only reply to dept. in error's brief, case of Stringfellow vs. Cain, 99 U. S. 610, is cited.